90-1144

No.

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1990

BIRENDRA MOHAN SHARMA, ASTRAL HOLDING CORPORATION, FREESIA SHIPPING CORPORATION, SUN LILY MARITIME INC., DOMAN TANKERS INC., and ZODIAC FINANCE CORPORATION,

Petitioners,

vs.

SKAARUP SHIP MANAGEMENT CORPORATION, OLE SKAARUP, and CHEMICAL BANK,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED:

1. Whether, under F.R. Civ. P. 56, a District Court can grant summary judgment dismissing all of petitioners' claims three days before trial without giving them any opportunity to respond to a motion for such relief where the denial of that opportunity precluded them from raising factual issues which would have precluded a dismissal?

2. After this Court's decisions in Celotex v. Catrett, 477 U.S. 3171 (1986), Matsushita Electric Industrial Co. v. Zenith Radio Corp., 475 U.S. 574 (1986) and Anderson v. Liberty Lobby, Inc., 477 U.S. 242 (1986), which now require a party to marshall all of its material evidence in order to defeat a summary judgment motion, can a District

Court's failure to even hear parties before dismissing all of their claims on the eve of trial be treated as harmless error?

RULE 29.1 LIST

Petitioner Astral Holding Corporation owns all of the shares of petitioners Freesia Shipping Corporation, Sun Lily Maritime Inc., Doman Tankers Inc., and Zodiac Finance Corporation. The petitioner corporations have no subsidiaries. Petitioner Astral Holding Corporation's parent corporation is Astro Navegador Armadora, S.A.

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In The

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BIRENDRA MOHAN SHARMA, ASTRAL HOLDING CORPORATION, FREESIA SHIPPING CORPORATION, SUN LILY MARITIME INC., DOMAN TANKERS INC., and ZODIAC FINANCE CORPORATION

Petitioners,

vs.

SKAARUP SHIP MANAGEMENT CORPORATION, OLE SKAARUP, and CHEMICAL BANK,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

Petitioners respectfully pray that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the

Second Circuit entered in the above-entitled proceedings on October 17, 1990.

OPINIONS BELOW

The opinion of the Court of Appeals for the Second Circuit is reported at 916 F.2d 820, and is reprinted in the appendix hereto, p. A1, infra.

The transcript of the oral rulings of the United States District Court for the Southern District of New York (Stanton, D.J.) made on October 11, 1989 is reprinted in the appendix hereto, p. D1, infra.

JURISDICTION

On April 23, 1986 (JA15-64*) petitioners brought this action in the Southern District of New York pursuant to 28 U.S.C. section 1332. On October 11, 1989, in response to a letter motion by respondent Chemical Bank ("Chemical"), the District Court made oral rulings which effectively dismissed petitioners' complaint (JA1631-43). On October 20, 1989, the District Court entered a final judgment dismissing all of petitioners' claims, pursuant to Fed. R. Civ. P. 54(b), so that an immediate appeal could be taken (JA1693-94).

On October 17, 1990, the Second Circuit Court of Appeals entered a

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* References hereinafter to "JA__" are to pages in the Joint Appendix which was filed in the Second Circuit Court of Appeals.

judgment and an opinion affirming the District Court's order. A petition for rehearing was denied by order entered November 30, 1990. On December 17, 1990, the Court of Appeals granted petitioners' motion for a stay of the mandate for thirty days pending the filing of a petition for writ of certiorari in this Court.

STATEMENT OF THE CASE

This is a breach of contract action. All of the petitioners and Chemical were parties to an agreement which gave petitioners the opportunity to arrange outside refinancing of three vessels owned by three of the petitioners and mortgaged to Chemical (JA188-99). Petitioners allege, inter alia, that Chemical breached the agreement by preventing them from

completing the refinancing.*

The agreement, as amended three

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* Between 1977 and 1981, Chemical had made mortgage loans to petitioners and their affiliates to finance the purchase of vessels (JA21-23) and by 1984, petitioners had repaid the bank over $43 million in principal and interest on these ship loans. However, because of a worldwide downturn in the shipping industry, revenues from the three shipping business were insufficient to service the debt to the bank (JA19). In February, 1984, an understanding was reached between the bank and petitioners whereby $2 million of outside funds were to be injected into the shipping operations in 1984 and those payments were being made well ahead of schedule (JA1794-95).

By August, 1984, however, the bank had concluded that the shipping market was about to recover and it wanted the vessels in its nominee's (Skaarup Ship Management Corporation)("Skaarup") possession so that they could be operated for profit for the bank and sold at the appropriate time (JA1753). It demanded that Mr. Sharma deliver the bills of sale to

(footnote continued)

times, gave petitioners seven and a half months to arrange the refinancing of the three vessels in the amount of $16,000,000 (JA1373). Over that period, petitioners paid the bank $1.2 million for the opportunity to refinance (JA1264, JA1806).

The refinancier named in the agreement required that two of the vessels be placed on three-year charters (the third was already under charter) as a condition to the refinancing.

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* (footnote continued)

it (JA1399-400, JA1780-81). He declined, and in discussions on September 3, 1984, the bank orally agreed to allow an outside refinancing (JA1372). After the bank violated the agreement by attempting to arrest the vessels (JA37), petitioners obtained an injunction from the High Court in England (JA1371). The parties then entered into the agreement at issue.

Charters are simply contracts by which an owner of a vessel agrees to its employment by a charterer, such as an oil company. On October 31, 1984, the agreement was amended to permit two of the vessels to be chartered for up to 38 months, subject to certain conditions.

After these conditions were completely fulfilled, petitioners presented Chemical with two three-year charters to Thakur Shipping Company ("Thakur") which fully complied with the October amendment (JA1416-17). Chemical, in breach of the October amendment, refused to allow the confirmation of these two charters (JA1417). As a result, the refinancing was lost and, after interlocutory proceedings in England, the vessels were

transferred to Skaarup.*

On April 23, 1986, petitioners commenced this action. Discovery did not commence until three years later in April, 1989. During the first three years of the action, without permitting any discovery, the District Court allowed the respondents to make seven dispositive motions with respect to some or all of the allegations of petitioners' original and first three

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* It is important to note that the Second Circuit's discussion of the bank's right to refuse charters (A17-19) relates to Paragraph XIV of the original refinancing agreement, not to refusals of charters under the October amendment. Both the District Court and the Second Circuit would have allowed proof at trial that the refusal to allow confirmation of the Thakur charters was a breach of the October amendment, but paradoxically would not allow recovery of the lost income on the two charters.

amended complaints. The motions were as follows:

1. On May 28, 1986, Chemical moved to dismiss under F.R. Civ. P. 12(b).

2. On August 4, 1986, it moved to amend its first motion to dismiss to add further grounds under F.R. Civ. P. 12(b), 12(f) and 56.

3. Skaarup joined in the motion on August 11, 1986. Almost a year later, by order dated June 5, 1987, the Court granted substantial portions of the motion without prejudice to its renewal after service of an amended complaint.

4. After plaintiffs filed an amended complaint, Chemical moved again on August 17, 1987 to dismiss or strike pursuant to F.R. Civ. P. 12(b), 12(f) and 56.

5. Skaarup also filed a dismissal motion with respect to the amended complaint on September 8, 1987. Thirteen months later, by order entered October 14, 1988, the Court dismissed Skaarup from the case and granted Chemical's motion in substantial part. The grounds the Court relied on had been briefed in the original round of briefing in 1986.

6. After petitioners filed their second amended complaint, Chemical moved to dismiss it by letter motion dated December 19, 1988, pursuant to F.R. Civ. P. 12(b) and 12(f). The Court granted the motion.

7. After petitioners filed their third amended complaint, the bank moved to dismiss it by letter motion dated February 10, 1989, under F.R. Civ.

P. 12(b) and 12(f). The Court granted that motion.

Finally, on March 31, 1989 (JA555-56), the Court allowed the case to proceed based on a narrow fourth amended complaint and set a firm trial date of October 16, 1989. From April, 1989 through October 10, 1989, the parties conducted intensive discovery. Over 110,000 documents were produced, 41 days of depositions were conducted in New York, London, Maine and Pennsylvania and three sets of lengthy interrogatories were answered.

Discovery proved to be very productive from petitioners' point of view. On September 5, 1989, petitioners moved, inter alia, for leave to serve a proposed fifth amended complaint, incorporating the results of discovery (JA442-46). The District Court denied

it on the grounds, inter alia, that it was made too close to trial (JA1012-17, JA1606-13).

On October 3, 1989, pursuant to the District Court's pre-trial rules, the parties submitted the joint pre-trial order (JA1338-1528), affidavits setting forth their experts' opinions, voir dire questions, requests to charge and their trial briefs.

On the evening of October 5, 1989, the day before the final pre-trial conference, Chemical's counsel wrote the Court (JA1837-48) and asked it to treat the letter as: (a) yet another motion for summary judgment dismissing petitioners' claims; (b) a motion for a directed verdict as to all of petitioners' claims; or (c) a motion in limine striking all of petitioners' evidence. The letter stated that these

three motions were based upon the 85-page trial brief (JA1018-1107), which contained some twelve separate points (JA1019-22), the 161-page joint pre-trial order (JA1368-1528), the deposition testimony of some seventeen witnesses and some 35,000 documents.

In letters of October 5 (JA1546-49) and 6 (JA1562-66) and orally at the October 6 pre-trial conference (JA1580-1605), petitioners repeatedly argued that it was far too close to trial for Chemical to be making yet another dispositive motion, particularly after having made numerous such motions for the first three years of the action. Petitioners also argued that, if the District Court considered the motion, they were "entitled to a proper motion which complies with all of the requirements of F.R. Civ. P. Rule 56 and

Local Rule 3 and that we be allowed to respond to it within the time allowed by Rule 56(c), ten business days before the date fixed for a hearing (JA1563-64)."

At the October 6, 1989 pre-trial conference (JA1580-1605), Chemical's counsel handed the Court three more memoranda of law. The Court said it would consider the matter over the upcoming long weekend (JA1585-86) and hold another conference the following Wednesday, October 11, 1989 (JA1599-1600). The Court specifically directed petitioners' counsel not to brief the massive new motion and said, "[i]f you want to put in further briefs, we will talk about it on Wednesday (JA1599)."

No opportunity to respond or brief Chemical's motion was ever given to petitioners. The District Court,

without allowing argument, announced at the beginning of October 11, 1989 conference (JA1631-43) that it had opted to treat Chemical's October 5th letter as a motion in limine (JA1635-37). It then immediately read a short decision which struck all of petitioners' proposed findings on damages and a substantial part of their proposed findings on liability (JA1635-37).

The Court held -- in a three sentence ruling -- that petitioners could not recover lost profits and that their recovery was limited to the market value of the vessels at the time of their transfer to Skaarup (JA1636-37).

The market value of the vessels at that time (approximately $15 million) (JA1647) was less than the $16 million petitioners were required to pay Chemical under the final amendment to

the agreement. The damage ruling therefore totally precluded any recovery by petitioners at trial.* Accordingly, the following day, petitioners requested (JA1648), and the Court thereafter entered, a judgment pursuant to F.R. Civ. P. 54(b) (JA1693-94) so that petitioners could promptly take an appeal.

Petitioners then sought to make offers of proof (JA1657). Chemical's counsel opposed any offers of proof (JA1658), but conceded that "the references in the pretrial order to the evidence to be adduced under it" should be part of the record on appeal

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* Chemical had known for over two years that plaintiffs were seeking lost profits, since a memorandum of law plaintiffs had filed on October 9, 1987 (JA414-17) set forth the damage claim in detail.

(JA1659). Petitioners accordingly submitted the exhibits referred to in the stricken findings of the joint pre-trial order to the District Court and requested leave to file them (JA1683-85). Despite his representation, Chemical's counsel opposed the request (JA1686-88) and the Court entered an order denying petitioners' request (JA1692).

Petitioners then moved to alter the judgment to the extent of seeking leave to file written offers of proof (JA1906-13). The District Court denied this motion by Memo Endorsement dated December 5, 1989 (JA1828). The Court had originally said that its rulings were on a motion in limine -- not on the summary judgment motion. However, its orders denying petitioners leave to file the exhibits and offers of proof stated

that there was no need for the filing of evidence since its rulings "did not rest upon the evidence to be adduced in support of those paragraphs . . ." (JA1692) (emphasis supplied) and that it had stricken the damage theory "as a matter of law (JA1828)."

Petitioners appealed the District Court's October 11, 1989 rulings, as well as other rulings. They contended, inter alia: (a) that dismissing petitioners' action without first allowing them any opportunity to respond violated the mandatory provisions of F.R. Civ. P. 56(c) as well as their right to due process of law, and (b) that the Court's damage ruling was insupportable under New York law.

On the latter issue, petitioners argued that applying a market value standard -- after assuming

a breach by the bank -- resulted in denying petitioners exactly what they had bargained for, i.e., the right to keep the vessels and operate them, and absurdly assumed that petitioners had paid $1.2 million over the course of seven and a half months in order to obtain nothing.

The Court of Appeals affirmed the damage ruling and never addressed the fact that the District Court had dismissed petitioners' entire case without even hearing them. In one sentence at the end of its opinion, the Court concluded: "Because of our disposition of the legal issues raised on this appeal, the various procedural errors claimed by appellants are moot (A20)."

The Court of Appeals affirmed the damage ruling by enunciating, for

the first time, a new principle of New York law, i.e., that regardless of the factual circumstances, where a breach of contract destroys or totally deprives a plaintiff of a business or income-producing asset which has a market value, lost profits are never recoverable, because market value encompasses lost profits.

Throughout the course of the litigation, the District Court repeatedly referred to the fact that the bank had reduced the debt by almost 50%, implying that, because of that reduction, petitioners should not be pursuing a claim under the agreement (JA838-39, JA1607-08). The Second Circuit's opinion reflected a similar inability to differentiate petitioners' status as debtors from the legal validity of their contractual claim (A8,

A16). At the conclusion of its recitation of the facts, the Court of Appeals referred to the reduction of the debt and summarized the bank's view of the litigation as "a case of no good deed going unpunished (A8)."

REASONS FOR GRANTING THE WRIT

POINT I

AFTER THIS COURT'S DECISIONS IN THE CELOTEX TRILOGY, A DISTRICT COURT'S TOTAL FAILURE EITHER TO ALLOW PETITIONERS TO BE HEARD OR TO FOLLOW RULE 56 PROCEDURES BEFORE DISMISSING THEIR CLAIMS CANNOT BE HARMLESS ERROR ON APPEAL

This case graphically illustrates the dangers of allowing District Courts to totally evade the mandatory requirements of Rule 56 under the rubric of "harmless error." Because the District Court repeatedly prevented a proper record from being made below, the Court of Appeals completely

misunderstood the evidentiary basis for the case when it fashioned an unprecedented "market value" limitation on recovery of lost profits. Indeed, the inaccuracies in the Second Circuit's opinion illustrate exactly why it is critical that a factual record be made -- either through Rule 56 or through a trial -- before a case is considered on appeal or a broad rule established. See, e.g., Herzog v. Strauss v. GRT Corp., 553 F.2d 789, 792 (2d Cir. 1977) (Compliance with the ten-day notice requirement of Rule 56 "is vital if the court is to make an informed decision . . .").

Although numerous New York cases instruct that the issue of lost profits is an extremely fact-specific

one,* the Second Circuit did not conduct any inquiry under Rule 56 to determine whether issues of material fact existed and did not consider any of the substantial evidence which had been adduced on the issue of lost profits. This was largely because the District Court had issued its damage rulings without allowing responsive affidavits and briefs pursuant to Rule 56, and had refused to allow either the exhibits to the pre-trial order or offers of proof to be filed with the Clerk.

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* Greasy Spoon, Inc. v. Jefferson Towers, Inc., 75 N.Y.2d 792, 551 N.E.2d 585, 552 N.Y.S.2d 92 (1990); American List Corp. v. U.S. News and World Report, Inc., 75 N.Y.2d 38, 549 N.E.2d 1161, 550 N.Y.S.2d 590 (1989); Kenford Co. v. County of Erie, 73 N.Y.2d 312, 537 N.E.2d 176, 540 N.Y.S.2d 1 (1989); Kenford Co. v. County of Erie, 67 N.Y.2d 257, 493 N.E.2d 234, 502 N.Y.S.2d 131 (1986).

Because no evidentiary record existed on the motion below, the Court of Appeals completely misunderstood at least the following:

1. The Court held that the measure of recovery was limited to the vessels' market value because market value "takes expected lost future profits into account (A14)." In so ruling, the Court misunderstood the fact that the market value the District Court had utilized was on a "charter-free" basis which did not take into account future profits from charters. Specifically, that value did not take into account profits from two three-year charters which the bank's breach prevented. The logic of the market value limitation established by the Court of Appeals' decision obviously requires that the market value utilized

not be one reduced by the impact of a defendant's breach. The "charter-free" nature of the $15 million valuation was known to both parties and would have been part of the record on a proper Rule 56 motion.

2. The Second Circuit's opinion also specifically assumed that petitioners had the ability to replace the vessels in the market (A17). Under applicable law, if no such ability exists, a plaintiff is entitled to consequential damages, including lost profits.* On a proper record, petitioners' evidence, including testimony on cross-examination of one of the bank's officers, Harold McCleery,

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* Larsen v. A.C. Carpenter, Inc., 620 F. Supp. 1084, 1131 (E.D.N.Y. 1985), aff'd without opinion, 800 F.2d 1128 (2d Cir. 1986).

would have readily shown that petitioners had no ability to replace the vessels in the market at the time of the bank's breach.

3. The Court stated that it would be "far-fetched" to infer that the bank would have contemplated liability for lost profits (A16). In reality, the evidence, including numerous internal bank memoranda gathered during discovery, reflected exactly that, which would have been clear had Rule 56(c) been observed.

4. The Court characterized petitioners' damage theory as a "wait and see" (A15) one which would calculate damages based on how the shipping market fared long after the breach. In fact, the evidence was that petitioners' lost profits projections were based on facts known as of the date of the breach

(including income from the Thakur charters), and conservative projections thereafter -- not on subsequent market conditions.

5. The Court also justified the rule it established by saying that "either party has an opportunity to hedge according to his or her judgment about the future stream of income (A14)." In fact, the evidence would have reflected that no such ability to "hedge" existed on the facts of this case.

6. The Court justified its ruling on a provision of the agreement by stating that "Appellants were, of course, free to arrange refinancing, if available, simultaneously with long-term charters (A19)." In fact, both Chemical's and petitioners' witnesses

would have testified that no such ability existed, to Chemical's knowledge.

7. The Court's opinion discusses the case as if it was a creditor's action to foreclose upon collateral after a default by a debtor, rather than a contract action by parties to a refinancing agreement against another party to that agreement, in a context in which the agreement completely restructured the parties' rights.

Because it had been prevented from seeing the evidence, the Court of Appeals' opinion repeatedly confuses petitioners' prior status as debtors with the issue of their rights under the negotiated agreement (A4-6; A15-16). A reading of the Second Circuit's opinion strongly suggests that -- like the District Court (JA838-39; JA1607) -- the

Court of Appeals took a dim view of petitioners' claims because they had previously owed the bank a substantial sum of money (A16-17).

The Court's opinion assumes (a) that the bank was somehow generous in a non-business sense in reducing the debt from over $30 million to about $16 million, and in releasing Mr. Sharma from his guarantees; (b) that these concessions are somehow related to the opportunity to refinance; and (c) that petitioners were seeking to take advantage of the bank's loss and its generosity in the face of that loss ("a case of no good deed going unpunished (A8)"). In reality, even before the refinancing agreement was executed, the bank had offered to release petitioners if they would surrender the ships, which were then worth about $16 million. This

was hardly an act of generosity by the bank (which had that same year blackmailed Mr. Sharma's family in an effort to collect the debt)(JA1788-94)). Rather, the bank's actions were a simple reflection of the commercial reality of the vessels' value. In fact, at any time after the agreement was executed, petitioners could have simply walked away and achieved the same result -- the release of their obligations in return for the surrender of the ships. Given these facts, it is clear that the reduction in the debt was wholly unrelated to the refinancing aspects of the agreement, pursuant to which petitioners paid handsomely ($6,000 a day) for the opportunity to refinance and save their businesses.

Once these facts are understood, it becomes clear that the Court's limitation of damages to the market value of the ships effectively means petitioners bargained for and paid out over $1.2 million for nothing, since the Court's limitation leaves petitioners in the exact position they were in before they entered into the refinancing agreement. At the minimum, petitioners were entitled, as a matter of unjust enrichment, to the return of their $1.2 million dollars. They were also entitled to damages, measured by their loss of profits, for the loss of the bargain the bank's breaches denied them. Any other result leaves petitioners uncompensated and Chemical's breach unsanctioned. Thus, the Court's assumption that the bank has lost enough, that it had generously let

petitioners off the hook, and that petitioners are somehow seeking to punish the bank for its generosity, all are patently false and obscure the reality here, i.e., that Chemical reluctantly but of necessity made a bargain for which it received $1.2 million, that the bank in bad faith breached the bargain, has retained the $1.2 million, and even persuaded the Court that its "punishment" is the return of the parties to the situation, which was favorable to the bank, that existed before the bargain was made. In short, the Court's remedy for the bank's breach is to act as if the agreement and breach had never occurred.

This misperception of petitioners and their claims, which was the direct result of characterizing the absence of an evidentiary record as

harmless error, caused the Court of Appeals: (a) to affirm a result which is illogical, and (b) to establish a simplistic, across-the-board rule on lost profits which is not fact-sensitive and is directly contrary to the holdings of four recent decisions of the New York Court of Appeals*, as well as the contract law of virtually every other state.** The case therefore aptly

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* Greasy Spoon, Inc. v. Jefferson Towers, Inc., 75 N.Y.2d 792, 551 N.E.2d 585, 552 N.Y.S.2d 92 (1990); American List Corp. v. U.S. News and World Report, Inc., 75 N.Y.2d 38, 549 N.E.2d 1161, 550 N.Y.S.2d 590 (1989); Kenford Co. v. County of Erie, 73 N.Y.2d 312, 537 N.E.2d 176, 540 N.Y.S.2d 1 (1989); Kenford Co. v. County of Erie, 67 N.Y.2d 257, 493 N.E.2d 234, 502 N.Y.S.2d 131 (1986).

** Both the District Court and the Second Circuit relied heavily on tort law in reaching this result, ignoring the fact that petitioners,

(footnote continued)

demonstrates the appropriateness and importance of creating a sufficient factual record under Rule 56(c) prior to resolving a dispositive motion.

The Second Circuit's holding that the failure to allow petitioners to be heard before dismissal was harmless error is also wrong as a matter of law and directly conflicts with the decisions of other Circuits holding that Rule 56(c) is mandatory. Those decisions were all rendered prior to this Court's holdings in a trilogy of cases, Matsushita Electric Industrial Co. v. Zenith Radio Corp., 475 U.S. 574 (1986), Anderson v. Liberty Lobby, Inc.,

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** (footnote continued)

unlike tort plaintiffs, had paid $1.2 million for the contractual right to refinance their businesses.

477 U.S. 242 (1986) and Celotex v. Catrett, 477 U.S. 317 (1986). Celotex held that a movant's burden on a summary judgment motion would depend on his burden of proof at trial, while Anderson and Matsushita substantially expanded the discretionary authority given to District Courts by allowing broad pre-trial evidentiary review on a Rule 56 motion. If there were important reasons to require strict compliance with Rule 56 prior to 1986, a fortiori, after the trilogy's substantial expansion of the risk to a non-moving party of entry of summary judgment against it, there is no justification for permitting any deviation from the rule now.

Prior to the 1986 Celotex trilogy, numerous Circuits had passed upon the issue of whether or not various

types of non-compliance with Rule 56, such as shortened notice, can be harmless error and had reached varying conclusions. Many, including the Second Circuit, had adopted a strict view. See e.g., Gutwein v. Roche Laboratories, Inc., 739 F.2d 93 (2d Cir. 1984), where the Court held:

> While we may have left the door open for application of a harmless error rule, ... we believe that use of such a rule must be limited to extraordinary cases in which the ten day notice is impractical, and it is absolutely clear that the non-moving party suffered no prejudice from a shortening of the period. This follows, we believe, from the non-moving party's burden of production and the need for time to marshall and prepare documents indicating the presence of a disputed factual issue. Since preparation of papers to oppose a motion for summary judgment may differ materially from preparation for trial, the better practice is to establish discovery schedules which allow such motions to be made and

> considered prior to the trial date and simply to deny motions which do not afford the necessary notice.*

Id. at 95. Petitioners are aware of no case prior to this one in which a District Court's dismissal of a complaint without even allowing a plaintiff to be heard has been treated as harmless error.** Indeed, the Second

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* Here, although the District Court had denied petitioners' motion for leave to amend on grounds of proximity to trial three and a half weeks before trial, it granted the bank's summary judgment motion on the eve of trial without allowing any response.

** Where, as here, a District Court styled its rulings as rulings "in limine", and then dismissed the case, the Third Circuit held that "a Court may not dispose of the case on the merits without giving the opposing party a reasonable opportunity to present to the court material relevant to the dispositive issues," however the motion is denominated. Brobst v. Columbus Services Int'l, 761 F.2d 148, 154 (3d Cir. 1985).

Circuit itself in Winbourne v. Eastern Air Lines, Inc., 632 F.2d 219 (2d Cir. 1980), explicitly rejected such a contention. There, the Court stated that "[a]lthough a harmless error analysis may be appropriate in some cases, it would appear that, at a minimum, the party against whom judgment is to be entered should be given an adequate opportunity to oppose the motion." Id. at 223-24 n. 6.

The holding in this case, which sanctions a total failure to follow Rule 56 as harmless error, directly conflicts with rulings of other Circuits. In Indiana Port Commission v. Bethlehem Steel Corporation, 702 F.2d 107 (7th Cir. 1983), the Court held that "a district court which does not comply with the advance notice and response provisions of Rule 56(c) has no power to

enter summary judgment." Id. at 111. The Court specifically dealt with the contention that a failure to allow a party to respond could be harmless error:

> While we note that the "harmless error" doctrine has occasionally been employed in cases where the procedural requirements of Rule 56(c) have not been strictly complied with, see Ikard v. Lapworth, 435 F.2d 197 (7th Cir. 1970), we find that, at a minimum, some opportunity should be given to oppose a summary judgment motion, and, in this case, clear harm to Bethlehem resulted from the total lack of such an opportunity. 702 F.2d at 111, n.2.

The Eighth Circuit has also held that a judgment dismissing substantive claims cannot properly be sustained where the proceeding which led to the dismissal is fraught with procedural irregularities. Winfrey v. Brewer, 570 F.2d 761, 764 (8th Cir. 1978). The Sixth Circuit has held to

the same effect in Management Investors v. United Mine Workers of America, 610 F.2d 384, 389-90 (6th Cir. 1979):

> In choosing to act as it did on this two-day-old motion for summary judgment, the district court disposed of a complex case without even permitting plaintiffs the benefits of applicable procedural rules. Local Rule 12(b) allows a party five days after a motion is served to respond. And where the motion is determinative of the case on the merits, Local Rule 12(c) provides for an oral hearing upon request by either party. Under rule 56(c), F.R.Civ.Pro., a litigant has a minimum of ten days within which to respond to a motion for summary judgment.
>
> In this case, however, the Union's motion was not served . . . until . . . the same day the district court rendered its decision granting the motion. We are of the view that these precipitous acts by the trial court denied plaintiff his due process right to be heard.

Id. at 389-90 (footnotes omitted).*

The decisions requiring strict compliance with Rule 56 were rendered prior to this Court's decisions in the Celotex trilogy, at a time when it was extremely difficult to obtain summary judgment in Federal Court. See

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* In Management Investors, the Sixth Circuit also rejected the argument that the pretrial briefs and the proposed Findings of Fact and Conclusions of Law satisfied the rights afforded by the Federal Rules of Civil Procedure and due process of law:

> However, the fact that the issue had been addressed elsewhere cannot serve as the basis for denying plaintiff an opportunity to address the issue as specifically raised in the motion. Considerations of justice and fair play required that plaintiff be granted an opportunity to respond to the motion prior to the court's decision . . . .

Id. at 390 n. 16.

Issacharoff, Second Thoughts About Summary Judgment, 100 Yale L.J. 73, 76-78 (1990). As discussed in Point II, infra, the trilogy is widely regarded as: (a) having expanded the use of Rule 56, and (b) greatly enhanced the ability of a party moving for summary judgment to quickly shift the burden to the non-moving party to come forward with evidence of the full range of facts in dispute. See generally id. at 80-84. Given that fact, and the evidence that up to 87% of summary judgment motions are now being granted, id. at 92, it is obviously critical that a non-moving party be given the full benefit of strict compliance with Rule 56. Combining the expanded dispositive powers given to District Courts by the Celotex trilogy with a harmless error doctrine which allows for little -- or,

in this case, no -- notice prior to granting the motion, creates an extremely pernicious result because it requires a non-moving party to make a far greater factual showing in less time. After the Celotex trilogy, there is simply no justification for a harmless error rule under Rule 56.

Moreover, this Court has held that due process requires that every litigant be given the "opportunity to be heard . . . at a meaningful time and in a meaningful manner." E.g., Armstrong v. Manzo, 380 U.S. 545, 552 (1965). To preserve that opportunity, it has repeatedly been held by Circuit Courts that the procedural requirements of Fed. R. Civ. P. Rule 56 "are to be strictly adhered to." Winfrey v. Brewer, 570 F.2d 761, 764 (8th Cir. 1978); Beck v. Borden, Inc., 724 F.2d 44, 45 (6th Cir.

1984); Ailshire v. Darnell, 508 F.2d 526, 528 (8th Cir. 1974). See, e.g., Adams v. Campbell County School District, 483 F.2d 1351, 1353 (10th Cir. 1973); Enochs v. Sisson, 301 F.2d 125 (5th Cir. 1962).

Accordingly, to the extent that the Second Circuit's decision permits the harmless error doctrine to be utilized to justify a total departure from mandatory Rule 56 procedures, it directly conflicts with numerous pre-Celotex holdings in other Circuits, and, after the trilogy, there are even more compelling reasons for a strict adherence rule.

POINT II

THIS COURT SHOULD GRANT CERTIORARI TO CLARIFY TO THE DISTRICT COURTS THAT THEIR EXPANDED POWERS UNDER F.R. CIV. P. 56 CANNOT BE USED TO ABRIDGE BASIC PROCEDURAL AND CONSTITUTIONAL RIGHTS

It has become increasingly evident in the past several years that some District Courts are abusing their recently expanded powers under the Federal Rules of Civil Procedure to dispose of legitimate claims with which they are unsympathetic. Many commentators have noted that a substantial number of District Courts have taken the Celotex trilogy as a license to summarily dispose of valid claims which they dislike. Because the procedures used in this case were so patently improper and the result so inherently illogical, the case presents

an appropriate one in which to clarify to the District Courts that their new powers under the trilogy are not to be used to deny unsympathetic plaintiffs their basic due process rights, their right to trial by jury or their right to equal justice under law.

This case presents an extraordinary departure from the accepted and usual course of judicial proceedings. For three and a half years, the District Court placed every conceivable obstacle in the way of petitioners' prosecuting their case to trial. When petitioners persevered and it became apparent that, notwithstanding these obstacles, the matter would still go to a jury, the Court dismissed petitioners' entire claim without even allowing them to be heard. On appeal, the Second Circuit treated these

undisputed departures from mandatory procedures as harmless error and affirmed a result which is inherently illogical, i.e., that petitioners had struggled for 7 1/2 months and paid Chemical $1.2 million for the opportunity to refinance vessels at $16 million in order to sell them immediately for $15 million in the middle of a market downturn. The case dramatically illustrates how, after the Celotex trilogy, the broad powers given the District Court under F.R. Civ. P. 56 can be abused when courts are hostile to the claims of a particular plaintiff.

Many commentators have expressed serious concern that the broad discretion the Celotex trilogy granted District Courts could be subject to

abuse.* Professor Louis has written: "This discretionary process could become arbitrary and unjust or lead to a backlash if trial courts, anxious to respond to the problems of today, begin to grant summary judgment too eagerly and regularly", Louis, Intercepting And

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* Although the District Courts were already granting summary judgment with increasing frequency prior to the Celotex trilogy, Pierce, Summary Judgment: A Favored Means of Summarily Resolving Disputes, 53 Brooklyn L. Rev. 279, 280-81 (1987), it is clear that the trilogy accelerated that trend, Note, Summary Judgment: The Majority View Undergoes A Complete Reversal In The 1986 Supreme Court, 37 Emory L.J. 171, 209-10 (1988). By 1988, the use of Rule 56 to dispose of cases had increased measurably. In a study of all published district court opinions for the first quarter of 1988, Professors Issacharoff and Loewenstein found that of the 140 motions for summary judgment made, 114 were granted in whole or part. Issacharoff, supra, at 92-93.

Discouraging Doubtful Litigation: A Golden Anniversary View of Pleading, Summary Judgment, And Rule 11 Sanctions Under The Federal Rules of Civil Procedure, 67 N.C.L. Rev. 1023, 1042 (1989), and predicted "[i]f form holds, today's procedural reform efforts will soon be engulfed by a resurgent anticlaimant bias fueled by a desire to make the judicial system efficient and claimants accountable," id. at 1034 (footnote omitted).

Others have noted that the trilogy "will add to the difficulties plaintiffs face in getting to trial," Weinstein, After Fifty Years Of The Federal Rules of Civil Procedure: Are The Barriers To Justice Being Raised?, 137 U. Pa. L. Rev. 1901, 1914 (1989), and have characterized Celotex as "asymmetrical, grossly favoring

defendants over plaintiffs no matter which party is the movant." Risinger, Another Step In The Counter-Revolution: A Summary Judgment On The Supreme Court's New Approach To Summary Judgment, 54 Brooklyn L. Rev. 35, 39 (1988).

The potential use of summary judgment against unsympathetic plaintiffs, after the trilogy, has also been noted:

> By deciding, before full development of the record at trial, that the nonmovant's side of a disputed factual story is not sufficiently probative to support a verdict by a reasonable jury, the judge can more easily eliminate not only claims that she finds unpersuasive in the instant case but also legal rights with which she is unsympathetic. Although delineating the unreasonable claim from that which is merely unpersuasive can become something of a philosophical exercise, there is a difference.

* * *

> A resourceful judge who wants to trim a difficult, time-consuming, distracting, or perceptibly weak case from her docket now has all the tools to do it.

Stempel, A Distorted Mirror: The Supreme Court's Shimmering View Of Summary Judgment, Directed Verdict, And The Adjudication Process, 49 Ohio St. L.J. 95, 166, 168 (1988).

Other writers have commented that the trilogy "in a very explicit way endorse[s] summary judgment as a substitute for trial," Marcus, Completing Equity's Conquest? Reflections On The Future Of Trial Under The Federal Rules Of Civil Procedure, 50 U. Pitt. L. Rev. 725, 740 (1989)(footnote omitted). It has been argued that an expansive reading of Matsushita "could seriously alter the

balance of power between judge and jury," Collins, Summary Judgment And Circumstantial Evidence, 40 Stan. L. Rev. 491, 492 (1988), and that Liberty Lobby effected a "shift of power from juries to judges in derogation of the seventh amendment." Stempel, supra, at 162.*

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* It is unquestioned that an improper grant of summary judgment deprives a party of his constitutionally guaranteed right to a jury trial. Risinger, supra, at 42. This Court has always been careful to preserve that right. See, e.g., Tull v. United States, 481 U.S. 412 (1987) (right to jury trial under Clean Water Act); Lytle v. Household Manufacturing, Inc., 110 S. Ct. 1331 (1990) (collateral estoppel not applied and right to jury trial upheld where court erroneously dismissed legal claims under section 1981), Granfinanciera, S.A. v. Nordberg, 109 S. Ct. 2782 (1989) (right to jury trial under Bankruptcy Act).

A number of commentators have viewed the expanded use of Rule 56, Rule 11, and various other Rules as part of an overall trend which has the serious potential to become anti-plaintiff and to deny or chill access to the Federal Courts. The trend has been called a "movement to restore to defendants, particularly powerful, establishment 'repeat player' defendants, traditional procedural advantages they lost by virtue of the Federal Rules' emphasis on full disclosure and decision on the merits." Risinger, supra, at 35 (footnotes omitted).

As Professor Louis has observed, "Nevertheless, in today's strident calls to correct the abuses of the Federal Rules . . . one sees the seeds of backlash in the federal courts' current, occasional reemployment of fact

pleading, seemingly unaware of its historical difficulties. . . and in their haste to employ the motion for summary judgment; even in state of mind cases, with no recognition of why they formerly moved cautiously. . ." Louis, supra, at 1034-35 n. 87.* Professor Carrington, Chairman of the Advisory Committee on the Civil Rules, has written: "Given the very heavy docket burdens that district judges now face, it is a reasonable concern that some may

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* Indeed, the District Court's actions in whittling down plaintiffs' case over a three-year period by granting successive motions made, in part, under F.R. Civ. P. 12(f), to strike so-called immaterial and impertinent allegations is exactly the kind of conduct uniformly criticized by the commentators as a revival of the old-fashioned code-pleading evil the Federal Rules were designed to abolish.

be tempted to overuse the devices of sanctions, summary judgment, and managerial judging to clear their civil dockets of large numbers of cases, including many, perhaps, that are meritorious, or at least sufficiently meritorious to deserve plenary attention." Carrington, Making Rules To Dispose of Manifestly Unfounded Assertions: An Exorcism of the Bogy of Non-Trans-Substantive Rules of Civil Procedure, 137 U. Pa. L. Rev. 2067, 2093-94 (1989).

In evaluating the history and effectiveness of the Federal Rules of Civil Procedures, Judge Weinstein noted, "Few disagree that the Federal Rules were intended by their drafters to open wide the courthouse doors . . . . The controversy that surrounds us today seems to me to be about the desirability

of free entry to our courts, but politically sensitive fundaments rarely are labelled forthrightly by their detractors." Weinstein, supra, at 1906-07 (footnote omitted). Judge Weinstein then discussed four areas where he believed access was being narrowed: Rule 11, Rule 23, pleading rules and Rule 56 after the Celotex trilogy. Id. at 1914.

A great deal of evidence has now emerged which indicates that, in practice, Rule 56 is being utilized in a manner which discourages access to the Federal Courts generally, and in particular to plaintiffs whose cases are not viewed sympathetically. "There is evidence in the post-trilogy case law that summary judgment has moved beyond its originally intended role as a guarantor of the existence of material

issues to be resolved at trial and has been transformed into a mechanism to assess plaintiff's likelihood of prevailing at trial." Issacharoff, supra, at 89. A recent study of post-trilogy cases indicated that 87% of the reported summary judgment motion were made by defendants, that courts were encouraging the filing of such motions, and that "[a]t the doctrinal level, courts are not reviewing the sufficiency of the defendant/movant's production." Id. at 92.*

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* Concern that the District Court's expanded powers under Rule 56 are being abused by some courts to deny access to unpopular plaintiffs is paralleled by criticism which contends that Rule 11 is being similarly abused in many cases. In its call for comments on Rule 11 dated July 24, 1990, the Advisory Committee on the Federal Rules of Civil Procedure asked whether "the

(footnote continued)

Because this case illustrates -- in an extreme way -- all of the

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* (footnote continued)

sanctions rules have been administered unfairly to any particular group of lawyers or parties?" and noted that "[p]articular concern has been expressed about the effect on civil rights plaintiffs."

Much commentary has noted the "chilling effect of the rule" on novel and disfavored claims. Nelken, Has The Chancellor Shot Himself In the Foot? Looking For A Middle Ground For Rule 11 Sanctions, 41 Hastings L.J. 383, 386 (1990). A Third Circuit Committee estimates that Rule 11 has been decidedly "anti-plaintiff in practice", Weinstein, supra, at 1913. The Committee found that plaintiffs or their counsel were the targets of two-thirds of the Rule 11 motions made during the one-year period studied and were sanctioned at a higher rate than defendants. Id. During the same period, the same study found that civil rights plaintiffs, their lawyers, or both, were sanctioned at a rate far higher than for plaintiffs as a whole. Burbank,

(footnote continued)

concerns expressed by the commentators quoted above, it presents a particularly appropriate one for the grant of certiorari. An objective observer of the proceedings in the District Court could not help but conclude: (a) that the District Court was very unsympathetic to petitioners, presumably because of their perceived prior status as substantial debtors of the bank; (b) that because of its dislike of petitioners, the Court required them to

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* (footnote continued)

The Transformation Of American Civil Procedure: The Example of Rule 11, 137 U. Pa. L. Rev. 1925, 1938-39 (1989). See generally, Tobias, Rule 11 and Civil Rights Litigation, 37 Buffalo L. Rev. 485 (1989) (arguing that Rule 11 has been applied disproportionately to civil rights claims and that this has a chilling effect contrary to the purpose of the Civil Rights Acts).

overcome obstacles other commercial plaintiffs in a contract action would never normally have to confront; (c) that the Court dismissed petitioners' case without first hearing them because it was clear that the case was a strong one which could have resulted in a substantial verdict against the bank, which the Court felt had already paid enough; and (d) that the District Court had little interest in the actual evidence supporting petitioners' claims because it would not even allow that evidence to be filed and reviewed by the Court of Appeals.

As the Sixth Circuit held in a related context in Anderson v. Sheppard, 856 F.2d 741, 746 (6th Cir. 1988):

> Moreover, it is our view that the dissenting opinion improperly focuses solely upon the fair trial aspect of the neutrality requirement. As

> illustrated above, the neutrality requirement serves dual purposes. It not only serves to preserve a fair trial, it also exists to engender public faith in the fairness and integrity of our tribunals. Not only must litigants actually receive a fair trial, they must also believe that they have been given a fair trial. See Connelly v. United States Dist. Court, 191 F.2d 692, 697 (9th Cir. 1951)("It is not enough that the judge, despite his predetermination of essential facts, may put them aside and conduct a fair trial but that there also shall be such an atmosphere about the proceeding that the public will have the 'assurance' of fairness and impartiality."). It is then, and only then, that people will tender their disputes to our courts for resolution. (emphasis in original)

Id. at 746. See also Marshall v. Jerrico, Inc., 446 U.S. 238, 252 (1980).

By any applicable standard, allowing respondents to make an aggregate of seven dispositive motions in three years without allowing

petitioners to take discovery, dismissing all petitioners' claims on the eve of trial without allowing responsive argument and then refusing to allow a factual record or offers of proof to be filed, constitutes a gross abuse of the Rule 56 procedure. Precisely because its procedural history is so extreme, the case presents an excellent vehicle for this Court to use to curtail the abuses of the Federal Rules which the above commentary reflects. When this Court unleashed the District Courts with expanded powers under Rule 56, its intent was to promote the efficient resolution of civil litigation. The new powers were never intended to sanction the kind of repeated harassment of a plaintiff which occurred in this case or to deprive a plaintiff of its constitutional right to

a jury trial. Equal justice under law requires that even plaintiffs with whom a judge is unsympathetic are entitled to their day in court if the nature of their claims -- as opposed to their status -- merits it. Because it is objectively indisputable that what occurred here was procedurally improper, and the legal result so obviously illogical, this case would allow the Court to reiterate that important principle without undercutting legitimate efforts at expediting litigation -- which might occur if the same message were delivered in a case with less extreme facts.

CONCLUSION

For the above reasons, the petition for a writ of certiorari should be granted, the decision of the Second Circuit Court of Appeals dated October 17, 1990, the oral rulings of the District Court dated October 11, 1989, and its judgment of October 20, 1989 should be vacated, and the case should be remanded to the District Court.

Dated: New York, New York
January 16, 1991

Respectfully submitted,

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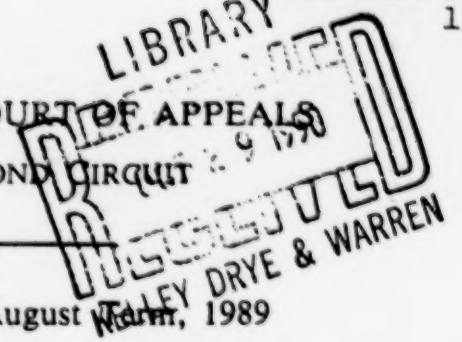
Appendix A

ENTERED ON
OCTOBER 17,
1990



UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

Nos. 1085, 1086—August Term, 1989

(Argued: March 26, 1990 Decided: October 17, 1990)

Docket Nos. 89-9191, 90-7015

BIRENDRA MOHAN SHARMA, ASTRAL HOLDING CORPORATION, FREESIA SHIPPING CORPORATION, SUN LILY MARITIME INC., DOMAN TANKERS INC., and ZODIAC FINANCE CORPORATION,

Plaintiffs-Appellants,

—v.—

SKAARUP SHIP MANAGEMENT CORPORATION, OLE SKAARUP, BENT LARSON and CHEMICAL BANK,

Defendants-Appellees.

Before:

OAKES, MINER and WINTER,
Circuit Judges.

Plaintiffs appeal following a Rule 54(b) judgment dismissing their complaint in the United States District Court for the Southern District of New York (Louis L. Stanton, *Judge*). Our principal holding is that damages

for the loss of three vessels resulting from alleged breaches of a refinancing agreement are limited to the market value of the vessels at the time of the breaches.

Affirmed.

PAUL F. DOYLE, New York, New York (Sarah L. Reid, Kelley Drye & Warren, New York, New York, of counsel), *for Plaintiffs-Appellants.*

DAVID H. BRAFF, New York, New York (William M. Dallas, Jr., Sullivan & Cromwell, New York, New York, of counsel), *for Defendants-Appellees Skaarup Ship Management Corporation and Ole Skaarup.*

HENRY LEWIS GOODMAN, New York, New York (Harold N. Schwinger, Menachem O. Zelmanovitz, Margot B. Schonholtz, Jay Teitelbaum, Zalkin, Rodin & Goodman, New York, New York, of counsel), *for Defendant-Appellee Chemical Bank.*

WINTER, *Circuit Judge*:

This appeal arises out of an action for the alleged breach of a financing agreement concerning three vessels. This agreement was between defendant-appellee Chemical Bank and plaintiffs-appellants Birendra Mohan Sharma ("Mr. Sharma"), Astral Holding Corp.

("Astral"), Freesia Shipping Corp. ("Freesia"), Sun Lily Maritime Inc. ("Sun Lily"), Doman Tankers Inc. ("Doman"), and Zodiac Finance Corp. ("Zodiac"). Appellants claim that Chemical Bank breached the agreement by preventing the refinancing of the vessels, thereby causing their foreclosure. They also claim that defendants-appellees Ole Skaarup and the Skaarup Ship Management Corp. (collectively "Skaarup") tortiously interfered with the contractual relations between appellants and Chemical Bank.

Appellants' claims were dismissed by the district court under circumstances described *infra*. We affirm.

BACKGROUND

Mr. Sharma was the president of Freesia, Sun Lily and Doman. Chemical Bank entered into secured financing agreements with Freesia, Sun Lily, and Doman that enabled the corporations to purchase the tankers WAYUSUT, WINGED DOLPHIN, and VALIANT PORPOISE, respectively, between 1977 and 1981. Mr. Sharma personally guaranteed the obligations of the corporations to Chemical Bank.

After 1981 and during a general decline in the shipping industry, the three corporations defaulted on payments of the principal of the loans. By September 1983, they were also in default on interest payments. In late 1983, apparently seeking to increase its oversight of the vessels as the collateral for the debt, Chemical Bank retained Ole Skaarup and the Skaarup Ship Management Corporation to inspect the ships and their records. Although appellants objected to the inspections because

Skaarup was a competitor in the shipping industry, they eventually acquiesced.

In August 1984, when over $30 million was due on the three mortgages, Chemical Bank advised appellants that it intended to terminate the financing agreements and take possession of the tankers. Chemical Bank arrested the tanker WINGED DOLPHIN on September 7, 1984, and took steps toward foreclosure on the other vessels. Appellants obtained an injunction ex parte from the High Court in London to halt the arrest proceedings. Chemical Bank sought to have the injunction vacated. Four days later, on September 12, 1984 and before an appellate ruling on the validity of the injunction, the parties settled the litigation through a new financing agreement ("Settlement Agreement").

The Settlement Agreement provided that appellants' debt to Chemical Bank would be fully discharged by surrender of the vessels or by a lump sum payment of $16.5 million to Chemical Bank with a commitment to refinance. Mr. Sharma was released from his personal guarantee of the debt.

The agreement afforded appellants twenty-eight days in which to arrange a refinancing of the vessels and fifty-six days to make the payment of the reduced debt. Under the agreement, appellants had to pay $2000 per day per vessel for the opportunity to refinance. Appellants released Chemical Bank from any claims arising prior to the Settlement Agreement, including the then-pending litigation in England. In addition, Paragraph XIV of the agreement provided that appellants would not "without the prior consent of [Chemical Bank] enter into any time charterparty of a longer duration of three months or any voyage charterparty which in the ordi-

nary course of events would last for more than three months or any demise charterparty." Pursuant to the agreement, appellants delivered bills of sale for the three tankers to an escrow agent, to be delivered to the new owners designated by Chemical Bank should appellants not pay the $16.5 million within the time stipulated.

Appellants failed to obtain refinancing within the time designated. They allege that this failure was caused by Chemical Bank's bad faith refusal to approve charter parties of more than three months under Paragraph XIV. On October 31, 1984, appellants and Chemical Bank reached a new agreement ("October Modification") that modified and extended the Settlement Agreement.

The modification provided:

> 2. On or before, 2nd November 1984, all financial institutions (the "Participants") participating in the refinancing of the Vessels (which shall be in the aggregate amount of US$16 million) shall have approved their respective participations subject only to:
>
> (a) satisfactory inspection of the Vessels,
>
> (b) the fixing of "Wayusut" and the "Winged Dolphin" under charter parties acceptable to the Participants and,
>
> (c) satisfactory documentation of the refinancing.
>
> and the Bank shall have received written confirmation of the foregoing from the Institution in form and substance satisfactory to the Bank.

3. On or before 7th November 1984, the Bank shall have received from the Institution written confirmation that item 2(a) above is no longer a condition to the closing of the re-financing.

4. Upon receipt by the Bank of the confirmation referred to in Item 3 above, the Companies shall be and hereby are authorized by the Bank to enter into charter parties covering the "Wayusut" and the "Winged Dolphin" *provided however*, that no such charter party shall (a) commit such Vessels, or either of them for a period (including options) of longer than 38 months, or (b) specify an average gross charter rate to the owner thereof of less than US$7.00 per ton, per month and (c) be in any form other than the standard major oil company form.

Further extensions were agreed to by Chemical Bank in January and March 1985, but appellants failed to procure refinancing before the final extension period expired on April 1, 1985. They attribute that failure to Chemical Bank's breach of the October Modification by refusing to allow them to enter into two three-year charter parties with Thakur Shipping Company that are alleged to have been within the thirty-eight month limit specified in the Modification. On April 26, 1985, title to the three tankers was transferred to Skaarup as Chemical Bank's designee. Skaarup managed the tankers' operations on behalf of Chemical Bank until Chemical Bank sold the three tankers in 1986 for approximately $14 million.

Appellants commenced this action in 1986, claiming that Skaarup tortiously interfered with contractual rela-

tions between appellants and Chemical Bank and that Chemical Bank breached implied and express duties of good faith and fair dealing under the various agreements. In the course of pretrial proceedings, they specifically asserted that Chemical Bank did not act in good faith by refusing charter parties in excess of the three months' duration of Paragraph XIV under the Settlement Agreement and breached the October Modification by preventing appellants from obtaining a three-year charter with Thakur Shipping. They also claimed that Chemical Bank acted in bad faith by instructing appellants' insurance broker to cancel the insurance on the three tankers in October 1984, and that Chemical Bank's arrangement with Skaarup, appellants' competitor, was injurious to appellants. Finally, they alleged that Chemical Bank breached an implied duty of confidentiality regarding plaintiffs' banking business and also breached an express duty of confidentiality set forth in the September 12, 1984 Settlement Agreement.

Appellants sought as damages, not the market value of the vessels on the date of the various breaches and repossession, approximately $15 million, but the profits that would have been earned in future years had appellants retained the three tankers. In their view, these damages amount to $80 million.

The gravamen of appellants' theory is that the Settlement Agreement was entered into by Chemical Bank to escape the effect of the High Court injunction and that Chemical thereafter wanted to prevent a refinancing. They argue that Chemical believed an upturn in the shipping industry was around the proverbial corner and wanted to acquire the vessels to resell them when that corner was turned. According to appellants, Chemical

Bank arranged that Skaarup would take title to the vessels and operate them until a profitable sale could be made. Allegedly, this arrangement was necessary to evade banking regulations that prevent banks from owning and operating ships for speculation. It is argued that the bank's various breaches of the Settlement Agreement and October Modification were intended to, and did, prevent a refinancing, enabling Skaarup to take title to the vessels. As a result, appellants lost the substantial profits they would have reaped had they continued to own the vessels when the demand for shipping increased.

Chemical Bank, of course, disputes this view of events. It points out that the Settlement Agreement was reached within four days after the ex parte injunction was issued and before its validity had been litigated. That Agreement, moreover, released Mr. Sharma entirely from his personal guarantee and appellants from over $14 million of the amount due, thus making it easier for appellants to satisfy the mortgage. The new principal amount, $16.5 million, is conceded by appellants to have been intended "to approximate the then market value of the vessels." Brief of Appellants at 29. The October Modification and subsequent amendments agreed to by Chemical Bank further liberalized the terms of the Settlement Agreement by extending the time for compliance and reducing the debt to $16 million. When title finally passed to Skaarup, the vessels had a value of $15 million. They were ultimately sold by Chemical Bank for $14 million. In the Bank's view, the present litigation, in which $80 million is sought as damages from a party that lost some $16 million on the transaction, is a case of no good deed going unpunished.

In October 1988, the district court dismissed all claims against the Skaarup defendants. *See Sharma v. Skaarup Ship Management Corp.*, 699 F. Supp. 440, 446-47 (S.D.N.Y. 1988). With regard to the tortious interference claim,[1] the district court held that appellants had failed to allege that the Skaarup defendants' acts were the "but for" cause of the alleged intentional breach of contract by Chemical Bank. *Id.* at 447. In the same ruling, the district court also dismissed various of appellants' claims against Chemical Bank, including the claim that Chemical Bank breached the Settlement Agreement by refusing to approve charters of more than three months under Paragraph XIV. *Id.* at 449. It reaffirmed this ruling on a motion for reconsideration. *Sharma v. Chemical Bank*, 723 F. Supp. 200 (S.D.N.Y. 1989).

According to the district court, the following issues remained alive in the case after the October 1988 ruling:

> Fact questions exist as to whether Chemical breached its duty of good faith and fair dealing through its arrangement with the Skaarup defendants, by advising [plaintiffs' insurance broker] to cancel plaintiffs' insurance in October 1984 and by giving confidential information to unknown persons, and whether Chemical breached its duty of confidentiality to plaintiffs by disclosing information about their Chemical accounts to third parties.

699 F. Supp. at 450. Not mentioned, but also pending, was the claim that Chemical Bank prevented appellants from obtaining the two Thakur Shipping charters that

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1 As to the Skaarup defendants, appellants challenge on appeal only the dismissal of Count III, the tortious interference claim.

are alleged by appellants to have been within the thirty-eight month limit of the October Modification.

The parties' trial briefs and the joint pretrial order were filed on October 3, 1989. In a letter dated October 5, 1989, Chemical Bank asked the district court to strike significant portions of appellants' evidence. The district court treated the letter as a motion in limine, and at a pretrial conference on October 11, 1989, Judge Stanton by oral decision struck a number of appellants' proposed findings of fact, including proposed findings on damages.

With regard to damages, the court stated that the sole measure of recovery was the market value of the vessels at the time title was transferred to Skaarup and that lost future earnings from the vessels were not recoverable as a matter of law.

At a conference the following day, the district court indicated that it had not struck appellants' claim regarding Chemical Bank's alleged breach of its obligation to approve the Thakur Shipping charters under the October Modification. It further indicated that it had not struck appellants' claims of breach of an implied duty of good faith and fair dealing in agreeing with Skaarup that it take title and operate the vessels, its instructions to the insurance broker, and its imparting of confidential information to various persons. The court did, however, reiterate that lost prospective earnings from the vessels was not a proper measure of damages.

At the conference, appellants advised the court that because the value of the vessels at the time title was transferred to Chemical Bank's designees was $15.2 million and the final amendment to the Settlement Agree-

ment provided for payment of $16 million to Chemical Bank, the market value of the vessels was less than the amount owed to Chemical under the settlement agreement. Appellants thus concluded that if damages were to be limited to the vessels' market value, they could recover no damages. Accordingly, they requested that the court enter judgment dismissing their claims. On October 18, 1989, the district court entered a final judgment dismissing all plaintiffs' claims pursuant to Fed. R. Civ. P. 54(b).[2]

DISCUSSION

On appeal, appellants challenge the district court's rulings striking proof of consequential damages. Appellants also appeal from the district court's earlier ruling that Chemical Bank had an unqualified right to refuse charters for more than three months under Paragraph XIV of the Settlement Agreement and from the dismissal of the tortious interference claim against Skaarup.

1. *Lost Profits*

As described above, appellants' theory is that Chemical Bank's alleged breaches of the various financing agreements prevented refinancing and caused appellants to lose the vessels in question. The loss of the vessels in turn deprived appellants of assets that would have produced substantial profits once demand for their use increased sometime in the future. They claim a right to those profits as damages. We disagree.

---

2 The district court's order severed and stayed proceedings on Chemical Bank's counterclaim pending the appeal in this matter.

It is a fundamental proposition of contract law, including that of New York,[3] that the loss caused by a breach is determined as of the time of breach. *See Simon v. Electrospace Corp.*, 28 N.Y.2d 136, 145, 269 N.E.2d 21, 26, 320 N.Y.S.2d 225, 232 (1971). It is also fundamental that, where the breach involves the deprivation of an item with a determinable market value, the market value at the time of the breach is the measure of damages.[4] *See id* at 145-46, 269 N.E.2d at 26, 320 N.Y.S.2d at 233.

Numerous cases illustrate these principles. For example, changes in currency exchange rates subsequent to a breach may not be taken into account in measuring damages. *See Parker v. Hoppe*, 257 N.Y. 333, 178 N.E. 550 (1931). The damage award resulting from a breach of an agreement to purchase securities is the difference between the contract price and the fair market value of the asset at the time of breach, not the difference between the contract price and the value of the shares sometime subsequent to the breach. *See Aroneck v. Atkin*, 90 A.D.2d 966, 967, 456 N.Y.S.2d 558, 559 (App. Div. 4th Dep't 1982) (rejecting claim that value of securities should be based on performance of business in 1979 and 1980 rather than at time of breach in 1978 when value was $0). Where a purchaser breaches a con-

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3 The Settlement Agreement provides that it "shall be governed by and construed in accordance with English Law and shall be subject to the Jurisdiction of the English Courts." The parties agree, however, that New York and British law are the same and ask us to apply New York law. Brief of Appellants at 25; Brief of Appellee at 18. *See also* 723 F. Supp. at 202 (noting that English law comports with New York law on contract interpretation question).

4 Whether we view appellants' claim as involving the deprivation of financing or the deprivation of the three vessels is irrelevant because each had a market value at the time of the breach.

tract to buy real estate, the measure of damages is the difference between the contract price and the fair market value at the time of breach, even though the seller is able to sell the real estate only later and for less than the value on the date of breach. *See Webster v. DiTrapano*, 114 A.D.2d 698, 699, 494 N.Y.S.2d 550, 551 (App. Div. 3d Dep't 1985) (contract price $63,500, value at time of breach $57,500, sold eleven months later for $55,000, damage award should have been $6,000). The same measure applies when a seller of a home breaches and the buyer is forced to assume higher interest rates in purchasing another home as a result of the breach. *See Lotito v. Mazzeo*, 132 A.D.2d 650, 651, 518 N.Y.S.2d 22, 23 (App. Div. 2d Dep't 1987).

Appellants have not led us to any New York authority that even remotely undercuts the numerous contrary precedents. They rely heavily upon *Greasy Spoon, Inc. v. Jefferson Towers, Inc.*, 75 N.Y.2d 792, 551 N.E.2d 585, 552 N.Y.S.2d 92 (1990). However, that case involved a lessor's refusal to execute documents enabling the lessee to obtain municipal licenses and permits to operate a sidewalk cafe adjacent to the lessee's restaurant. The licenses and permits did not have a market value and were not replaceable. Lost profits were therefore the best measure of the loss. Other cases that have awarded lost profits, such as *McLeod, Inc. v. R.B. Hamilton Moving and Storage*, 89 A.D.2d 863, 453 N.Y.S.2d 251 (2d Dep't 1982), are similarly distinguishable. In *McLeod*, a lessee of a crane failed to return it in good condition and thus caused it to be unusable for ten weeks. The court awarded the lessor the profits lost for the period in which it could not be leased. Had the crane been permanently rather than temporarily disabled, damages under New York law would have been

the value of the crane on the date of breach. Damages for the temporary loss would be the leasing value for that period, which is the same as lost profits.

Measuring contract damages by the value of the item at the time of the breach is eminently sensible and actually takes expected lost future profits into account. The value of assets for which there is a market is the discounted value of the stream of future income that the assets are expected to produce. This stream of income, of course, includes expected future profits and/or capital appreciation. To be sure, uncertainties about the future and lack of perfect information may cause an asset to be under- or over-valued at any particular time. At that time, however, either party has an opportunity to hedge according to his or her judgment about the future stream of income. New York courts have thus explicitly upheld damage awards based on "what knowledgeable investors anticipated the future conditions and performance would be at the time of the breach" and have rejected awards based on what "the actual economic conditions and performance" were in light of hindsight. *Aroneck*, *supra*, 90 A.D.2d at 967, 456 N.Y.S.2d at 559. Moreover, appellants are unclear about the time at which damages are to be determined under the rule they espouse. Certainly they are not entitled to select the precise date on which the vessels had their highest value or a period of time that was profitable but that excludes periods when losses occurred. If the time of trial governed, the rule would be a two-edged sword, because courts would have to diminish damage awards where the value of the item decreased or where losses were encountered subsequent to the breach as well as enhance them where conditions improve. However, New York courts have expressly refused to

adopt this "wait and see" theory of damages. They have explicitly rejected the use of subsequent changes in value or profits where they would increase an award, *see Webster*, *supra*, 114 A.D.2d at 699, 494 N.Y.S.2d at 551 (seller able to sell real estate only later and for price less than value on date of breach), *Lotito*, *supra*, 132 A.D.2d at 651, 518 N.Y.S.2d at 23 (buyer forced to assume higher interest rate in purchasing other home subsequent to breach), and where they would decrease the award, *see Aroneck*, *supra*, 90 A.D.2d at 967, 456 N.Y.S.2d at 559 (excluding increase in value of shares after buyer breaches contract to purchase).

Thus, under New York law, if the contract in question were for the sale of the vessels to appellants and the seller were to breach the contract, appellants' recovery would be limited to the value of the vessels on the date of the breach. We see no reason to reach a different result in the instant matter. In fact, the efficiency of the credit market will be impaired if a measure of damages other than the value of the collateral at the time of breach were applied to secured financing agreements. Collateral satisfactory to the lender almost always has a market value, allowing the lender to take possession and convert the security to money. The principal of the loan is determined by the market value of the collateral and the creditworthiness of the borrower. If, as in the case of the Settlement Agreement, a default permits a foreclosure on the collateral without further liability on the borrower's part, the principal has a ceiling at or near the value of that collateral. The lender would be foolish to risk more because the borrower has little incentive to repay. The interest rate is determined by the time value of money in the credit market and the creditworthiness of the borrower.

Under the rule espoused by appellants, lenders would have to take into account the risks of post-foreclosure litigation involving the value of the collateral at some unknown future time. These risks would be particularly great where the collateral fluctuates in value. When that value is low, borrowers would have a great incentive to default, the lender usually encountering a loss. However, if some time after default the value increases, the lender, who may well have lost money on the transaction, may be exposed to future claims that dwarf the original financing. Many ordinary items, such as securities, would be less valuable as collateral. The rule espoused by appellants would thus benefit neither lenders nor creditors, because it would render secured loans more risky, thereby impairing the availability of credit and increasing interest rates.

The facts of the instant case illustrate these principles. In making the Settlement Agreement and October Modification that are the basis for the breach of contract claim, the Bank consented to a reduction of the debt from $30 million to $16.5 million, a further reduction after the breaches alleged as the basis for this litigation to $16 million, a release of Mr. Sharma and an extension of time for obtaining refinancing. Appellants concede that the reductions in the principal of the debt were intended "to approximate the then market value of the vessels." Brief of Appellants at 29. Moreover, it is not disputed that when appellants defaulted, they were released from a $16 million debt in return for vessels worth $15 million. It seems wholly far-fetched to infer that a bank that reduces a mortgage loan by almost 50 percent so as to align the size of the loan with the contemporaneous value of the collateral would have so agreed if it contemplated an exposure to damages five

times the size of the reduced loan, $80 million, based on the value of the collateral at some unknown time long after the alleged breach.

We find, as did the district court, support in tort law for our conclusion. Had Chemical Bank negligently destroyed the vessels in question, its liability would have been limited to the vessels' market value at the time of their destruction. *See The Umbria*, 166 U.S. 404, 422 (1897); *Ozanic v. United States*, 165 F.2d 738, 743 (2d Cir. 1948); *The Hamilton*, 95 F. 844, 845 (E.D.N.Y. 1899). It would be odd to deny damages for lost profits in tort and award them in the present case, particularly since the measure of damages in tort cases is more generous than in contract actions. *See* Corbin, *On Contracts*, § 1019.

2. *Refusal of Charters Under Paragraph XIV of the Settlement Agreement*

Appellants argue that the district court erred in holding that under Paragraph XIV of the September 12, 1984 Settlement Agreement, Chemical Bank had an absolute right to withhold approval of charters longer than ninety days.[5] The district court was clearly correct, however, in finding that Paragraph XIV is unambiguous, 723 F. Supp. at 201, and gives Chemical Bank an unrestricted right to refuse charters longer than three months. This right furthers the purpose of the agreement to provide a limited opportunity to secure refinancing and to protect Chemical Bank's interest in the collateral for the long-overdue debt. Appellants would have us imply a duty to act reasonably in such circum-

5 Whether this issue need be reached in view of our disposition of the consequential damages issue is unclear. We reach it to obviate the need for further proceedings.

stances, but the content of any such duty is entirely unclear in light of the provision's plain intent to render the Bank's refusal unreviewable. We see no reason not to acknowledge the plain meaning of a clause that allows a lender to impose restrictions on the use of collateral and to have the unreviewable right to invoke those restrictions. Secured lenders have a clear interest in overseeing the disposition of their collateral and understandably bargain for rights that may be exercised without a court or other tribunal deciding whether such exercise was reasonable according to standards the parties have not defined.

Appellants' argument that Chemical Bank knew that long-term charters were necessary to obtain refinancing and was therefore bound to approve such charters where "reasonable" is unavailing. If the parties were indeed aware of that fact, Paragraph XIV could not have been inadvertent. It reflects, therefore, a conscious decision to allow Chemical Bank to refuse all such charters lest the refinancing fall through while the vessels become bound by long-term charters. Appellants were, of course, free to arrange refinancing, if available, simultaneously with long-term charters.

Extrinsic (parol) evidence regarding the terms of the agreement was properly excluded in light of the absence of any ambiguity. *See Cibro Petroleum Products, Inc. v. Sohio Alaska Petroleum Co.*, 602 F. Supp. 1520, 1545 (N.D.N.Y. 1985) (stating general contracts principle that if contract is unambiguous, extrinsic evidence should be excluded), *aff'd per curiam*, 798 F.2d 1421 (Temp. Emer. Ct. App.), *cert. dismissed*, 479 U.S. 979 (1986); *Schmidt v. Magnetic Head Corp.*, 97 A.D.2d 151, 157, 468 N.Y.S.2d 649, 654 (2d Dep't. 1983) (refer-

ence to extrinsic evidence not permitted even to determine whether ambiguity exists in contract).

Finally, we reject as utterly frivolous the argument that the Settlement Agreement is rendered "illusory" by this straightforward interpretation of Paragraph XIV. The agreement reduced appellants' liabilities by almost 50 percent, released Mr. Sharma from his personal guarantee, and extended the time in which appellants might satisfy the debt. As noted, moreover, nothing in the Agreement prevented appellants from arranging refinancing simultaneously with a long-term charter.

3. *Tortious Interference Claim*

As to the tortious interference claim against Skaarup, the district court properly dismissed Count III of the amended complaint for failure to allege that Skaarup's actions were the "but for" cause of Chemical Bank's alleged breach of the Settlement Agreement. Intentional procurement of a breach is an essential element of the tort of interference with contractual relations. A plaintiff must allege that "there would not have been a breach but for the activities of defendants." *Special Event Entertainment v. Rockefeller Center, Inc.*, 458 F. Supp. 72, 78 (S.D.N.Y. 1978); *see Merrill Lynch Futures, Inc. v. Miller*, 686 F. Supp. 1033, 1040 (S.D.N.Y. 1988). The appellants' theory of this case—that Chemical Bank's efforts to obtain the vessels were motivated by profit—is incompatible with an allegation of "but for" cause as to Skaarup. As stated by the district court, "In no way do plaintiffs allege that the Skaarup defendants were the motivating force behind Chemical's breach." 699 F. Supp. at 447.

CONCLUSION

Because of our disposition of the legal issues raised on this appeal, the various procedural errors claimed by appellants are moot. Affirmed.

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Appendix B

ENTERED ON
OCTOBER 20, 1989

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK
----------x

BIRENDRA MOHAN SHARMA, ASTRAL HOLDING CORPORATION, FREESIA SHIPPING CORPORATION, SUN LILY MARITIME INC., DOMAN TANKERS INC., and ZODIAC FINANCE CORPORATION,

Plaintiffs,

86 CIV. 3236 (LLS)

-v-

ORDER AND JUDGMENT

CHEMICAL BANK,

Defendant.

----------x

Plaintiffs, because of the court's pre-trial rulings, request entry of judgment (a) dismissing the complaint pursuant to Fed. R. Civ. P. 54(b) so that an appeal can be taken, and (b) severing and staying defendant's counterclaim pending the outcome of the appeal; defendant consents thereto; and

since that judgment disposes of all of plaintiffs' claims, there is no just reason for delay in its entry; and it is

ORDERED that the counterclaim of Chemical Bank against plaintiffs is severed and further proceedings in respect of the counterclaim are stayed pending the outcome of a timely appeal by plaintiff from this judgment; and it is

ADJUDGED AND DECREED that the fourth amended complaint and all prior complaints herein are dismissed with prejudice, with costs to be taxed by the Clerk in favor of defendant but payment thereof by plaintiffs, and execution thereon by defendant are stayed pending the outcome of plaintiffs' appeal from this judgment.

The Clerk is directed to enter

this judgment forthwith.

Dated: New York, New York
October 18, 1989

LOUIS L. STANTON
U.S.D.J.

Appendix C

ENTERED ON
OCTOBER 18, 1989

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK
----------x

BIRENDRA MOHAN SHARMA, ASTRAL HOLDING CORPORATION, FREESIA SHIPPING CORPORATION, SUN LILY MARITIME INC., DOMAN TANKERS INC., and ZODIAC FINANCE CORPORATION,

Plaintiffs,

86 CIV. 3236 (LLS)

-v-

ORDER

CHEMICAL BANK,

Defendant.

----------x

Since the pre-trial rulings striking Plaintiffs' Proposed Findings Of Fact # 6, 7, 9(a), 9(e), 10, 12(a), 14(c), 16, 17 and 17(a) (but not other sub-paragraphs), 18, 21(b) (second sentence only), 25(d), 32, and 39 as contained in the parties' October 3, 1989 joint pre-trial order did not rest

upon the evidence to be adduced in support of those paragraphs, there is no need or purpose in filing the three large boxes containing that evidence, as requested by plaintiffs' counsel in paragraph 5 (a) through (f) of his affidavit (affidavit of Paul F. Doyle, Esq., sworn to October 16, 1989), and that request is accordingly denied.

The request that the Clerk be directed to docket letters, transcripts and other materials as listed in paragraphs 6 and 7 of Mr. Doyle's affidavit is granted.

So ordered.

Dated: New York, New York
October 18, 1989

LOUIS L. STANTON
U.S.D.J.

Appendix D

ENTERED ON
OCTOBER 23, 1989

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK
----------x

B. M. SHARMA, et al,

Plaintiffs,

86 Civ.
3236 (LLS)

v.

CHEMICAL BANK,

Defendant.

----------x

October 11, 1989
2:35 p.m.

Before:

HON. LOUIS L. STANTON

District Judge

APPEARANCES

KELLEY DRYE & WARREN
Attorneys for plaintiff
PAUL F. DOYLE
SARAH L. REID
Of Counsel

ZALKIN, RODIN & GOODMAN
Attorneys for defendant
HENRY L. GOODMAN
MENACHEM O. ZELMANOVITZ
MARGOT B. SCHONHOLTZ
Of Counsel

(Case called; both sides ready)

THE COURT: Last week when we set this appointment for this afternoon, it was with the hope that at this time I could have reviewed the pretrial submission more completely and make some rulings which would be of use to the parties and their final preparation for trial, and I have been able to do that, and so I will discuss some of the pending matters before me.

Most of these matters, if not all of them, have been discussed by the parties in their trial briefs and in letters to the court during the past recent period, and I will have those letters docketed with the file in this action so the record is complete.

As you probably know, because I think my chambers advised you yesterday,

I have denied the application for a 1292 B certificate with respect to the denial of the motion for reargument, and I have also added to the memorandum denying the motion for reargument a citation and a quotation from a 1981 decision of the New York Court of Appeals, Collard v. Incorporated Village of Flower Hill, which dealt with the point.

Is there anyone to whom that announcement comes as news? Good.

All the letters referred to and the dates given for those letters all refer to letters to the court. In two of Mr. Doyle's letters, he tendered the view that the fourth amended complaint had received the sanction of the court, resting that on a conference earlier this year at which drafting changes were made to what I suppose must have been

the third amended complaint. It is true that the first three years of this litigation were spent in successive motions against complaints which were so prolix and verbose, so full of evidence and so far from compliance with F.R.C.P. 8(a), which requires a short and plain statement of the claim showing that the pleader is entitled to relief, that finally I had to participate in cutting the complaint down to a proper pleading of claims.

Of course, claims are merely assertions. Nobody could have imagined that in helping a party in its fifth efforts to express its claims, I was also ruling on the validity of those claims or determining that they would survive later motions as the case developed. Thus, Mr. Doyle's October

6th letter, as well as his October 5 letter stating that the complaint was santioned by the court, is in error if it is intended to imply prejudgment in the drafting process of defendant's present application.

By the same token, it should be obvious that in eliminating a pleading of evidence as being an improper pleading, I did not rule one way or the other on whether that evidence would be admissible at trial.

I turn at this point to the defendants' claim that the execution of amendments to the September 12 agreement bar evidence of intermediate breaches. At this stage, the mere execution of those amendments standing alone will not bar evidence of intermediate breaches. The cases dealing with this point have

reached their conclusions on rather full records concerning the circumstances of the amendments, and they have addressed particularly whether there was a specific arrangement with respect to the performance which had been expected under the main contract.

The principal that they apply is fairly stated in Thomson v. Poor in 147 N.Y. at page 409: "We know of no principle of law which will permit a party to a contract who is entitled to demand the performance by the other party of some act within a specified time and who has consented to the postponement of the performance to a time subsequent to that fixed by the contract and where the other party has acted upon such consent and in reliance thereon has permitted the contract time

to pass without performance, to subsequently recall such subsequent and treat the nonperformance within the original time as a breach of the contract."

Mr. Doyle's letter of October 10 says the amendments do not condone Chemical's actions or waive rights to damages for breaches, and I am not at this point excluding evidence of such claimed breaches merely because of the execution of the amendments.

Turning to another topic, Mr. Goodman's letter of October 5 requested that it be taken as a motion for summary judgment or as a motion to dismiss or as an application for in limine rulings. I choose the third and regard it as an application for in limine rulings, and as such, it is granted to the following

extent only: The proposed findings of fact which I will list are stricken. When a paragraph number is stated, that paragraph and all subdivisions are stricken unless specific subparagraphs are identified, in which case they are the only subparagraphs which are stricken.

The stricken paragraphs and subparagraphs are plaintiff's proposed findings of fact Nos. 6, 7, 9 A, 9 E, 10, 12 A, 14 C, 16, 17 and 17 A.

MR. DOYLE: Your Honor, I'm in a bit of embarrassing bind. We didn't seem to bring a copy of the pretrial order with us. I wonder if I could one borrow one for a moment?

THE COURT: I think you better follow the list for a moment, Mr. Doyle.

The 17 there refers to the

lead-in paragraph following the designation of the paragraph as 17; in other words, the material before 17 A. 17 A is also stricken, but the balance of 17, other than the first paragraph and 17 A, are not stricken. Paragraph 18 is stricken, paragraph 21 B, the second sentence only; paragraph 25 D, paragraph 32, and paragraph 39.

These rulings give effect to the prior orders of the court, the doctrine of merger and integration, the parole evidence rule, and the Federal Rules of Evidence, including Rules 402 and 403 to the extent proper for rulings in limine. Rulings in all respects, except these rulings on those paragraphs and subparagraphs, are reserved until trial. I am not at this time foreclosing any specific witnesses from

testifying except with respect to Mr. Bays and Mr. Wells. Mr. Bays' proposed testimony is inadmissible since it deals with the present value of the vessels, not their market value at the relevant time. Mr. Wells' statement is too vague since it gives the topics, but not the substance of his testimony.

As those of you who have been able to follow in the pretrial order will have observed, I have stricken the plaintiff's damage calculation as improper in law. The proper measure of recovery is the market value at the time of the vessels. That conclusion is supported by most relevant cases on the point starting with the Hamilton, The Umbria, Ozanic v. United States, Witheree v. Myer, Hadley v. Baxendale, and Herman Schwabe, Inc. v. United Shoe

Machinery Corporation, 297 F.2nd, 906.

MR. DOYLE: Your Honor?

THE COURT: Mr. Doyle?

MR. DOYLE: Your Honor, you started to say the market value at the time of the vessels, and you didn't finish the sentence. I don't think the reporter caught it, your Honor.

THE COURT: Could you read back what you got.

(Record read)

THE COURT: It is the market value of the vessel, Mr. Doyle.

MR. DOYLE: At what time, your Honor? The market value at the time of the vessel is what you said.

THE COURT: Leave out the words "at the time," Mr. Doyle. Construe the sentence as saying the market value of the vessels at the relevant time rather

than their prospective stream of earnings.

MR. DOYLE: Your Honor, when you say at the relevant time, what time are you referring to?

THE COURT: I would suppose it would be at the time that they were foreclosed.

MR. DOYLE: In other words --

THE COURT: When the title was transferred.

MR. DOYLE: April 26th, '85.

THE COURT: Mr. Doyle, I will allow you to present your case within the legal limits I am setting. If you think there is some other relevant time, you are free to argue it. The point is that the plaintiff's calculation in its present form, resting upon a future stream of earnings, is unavailable in

law and is stricken.

Now, I have not dealt with some other matters which were put before me such as the form of a verdict, the complaints about plaintiff's answers to interrogatories, and an application with respect to evidence concerning other vessels. I have not dealt with that because it may be that the parties would like some time to digest those matters with which I have dealt and to evaluate what they wish to say with respect to those other matters. So I am prepared to recess at this point to allow that process if counsel has no other suggestion.

Mr. Doyle?

MR. DOYLE: Your Honor, would it be possible to recess until tomorrow morning, perhaps? In other words, I

would like to assess the impact of your rulings, and if possible come back perhaps tomorrow morning, if that's conceivable. I think that probably makes the most sense.

THE COURT: Mr. Goodman?

MR. GOODMAN: If I understood your Honor, by recess, we might recess for approximately a half hour or 15 minutes, whatever? Did I understand your Honor correctly when you said recess, recess briefly now and then resume this afternoon?

THE COURT: We could do either or both.

MR. GOODMAN: I would prefer to do the latter, if that is consistent with your schedule.

THE COURT: The latter being tomorrow morning or a short recess now,

or both?

MR. GOODMAN: I would prefer the short recess now, your Honor. I do have two matters to deal with which are totally unrelated to the rulings that you have made.

THE COURT: What are they?

MR. GOODMAN: One is with respect to the trial, that is, transparencies, charts, exhibits to jurors and objections to opening statements and submissions and schedule of experts' depositions. These are really housekeeping matters. I have just prepared a list, your Honor, which I can show to you if you care to see it.

THE COURT: Wnat was the other matter?

MR. GOODMAN: The other matter had to do with a letter demand we made

on October 4th to Mr. Doyle's office asking for the identification and production of all documents and materials provided to each of the expert witnesses for the plaintiffs by their counsel. We have not received a reply to that yet or the materials.

MR. DOYLE: Your Honor, why don't we take that up tomorrow morning if it is all right? It is up to you. We could take it up now, but I think we ought to think through what you have done and see if we can deal with it.

MR. GOODMAN: The only reason I raise it is there are depositions continuing tomorrow and Friday.

THE COURT: Of whom?

MR. GOODMAN: I deposed Mr. Lambert yesterday --

THE COURT: Are you counsel for

Mr. Lambert?

MS. SCHONHOLTZ: No, your Honor.

THE COURT: Is counsel for Mr. Lambert here?

MR. GOODMAN: He was and he left.

MR. DOYLE: They reached an agreement with him.

THE COURT: All right.

MR. GOODMAN: I had deposed Mr. Lambert yesterday and this morning together with my associate Mr. Teitlebaum. Since we had this conference scheduled at 2:30, I had wanted my colleague, Mr. Teitlebaum, to continue and finish the deposition today. That met with resistance by Mr. Horowitz of Gilroy Downes & Horowitz, who Mr. Doyle selected as counsel for Mr. Lambert, and they wouldn't go forward on that basis. So it just

adjourned until 12:30, your Honor. I have to pick them up on Friday.

There are two depositions of defendants' witnesses scheduled for tomorrow, and that's why I would prefer, if at all possible, that we take a recess now and of either papers or assertions over the weekend, all of which by the way I have had docketed so that they are on file.

MR. DOYLE: It is intended to be respectful, your Honor.

THE COURT: I understand that and I take it entirely as such. Please understand that. These are matters of concern to us all as lawyers and trying to do the right thing with the case and I take it entirely in that spirit and you should do it to protect your positions.

it seems to me that does bring us to the damage point.

MR. DOYLE: Yes, your Honor.

As far as our interrogatory answers, if you total them up, in effect, say we got valuation of the vessels in April which total 15.2 million. The March 8 agreement provides for a payment to Chemical of 16. As a practical matter, once you say that is the vessel's market value at the time of the transfer in April 85, that means we have no recovery on our affirmative claims. I guess my point is I don't see any point in going to trial on an affirmative case that you are going to recover damages and spending all that money on it.

THE COURT: I understand that all. I'm confident that the law is that

the proper measure of recovery for the destruction or nonavailability of the subject matter of this the contract, even seen as a contract to subject matter, was the vessels rather than the debt. Even seen that way, the recovery for the loss of the vessels is the market value of the vessels, not their proposed projected earnings over a period of 15 years. And if I were not confident on the law I wouldn't have dismissed that damage approach.

MR. DOYLE: As I say, we respectfully disagree. Obviously, we are bound by your ruling.

THE COURT: If it's dispositive.

MR. DOYLE: It is dispositive.

THE COURT: I'll hear Mr. Goodman first. It seems to me there is some sense in setting that in concrete in

some way that allows you an appeal and then considering what should be done with the counterclaim.

MR. GOODMAN: I think your Honor correctly ruled on the measure of damages. We briefed the subject fully. I think your Honor's rulings with respect to the proposed findings and with respect to the damage issue as a matter of law, which it always is, is properly dealt with in limine at the threshold end of the, among others, National Football League case. I have no opposition to Mr. Doyle seeking a judgment dismissing the case and he's taking an immediate appeal and severing the counterclaim and staying the counterclaim pending the outcome of the appeal.

THE COURT: One of the reasons

why a proper damage calculation should be dealt with in limine in a case of this nature and complexity is that it avoids flooding the jury's ears with evidence which they may later have to be told to disregard. If a damage calculation is to be testified to by experts and displayed with the elaboration that this damage calculation has the jury can never be told effectively to disregard it when the evidence is stricken.

Furthermore, it's unfair to the parties on both sides, in my judgment, to allow the effort of preparation and presentation of that much evidence to be undertaken in a directior which the law ultimately will hold to be futile and for all those reasons it seems to me a proper in limine ruling. It's not one I

made simply to deal with a minor matter. I regard it as a major matter for the trial, one on which pretrial guidance was justifiably requested and should have been given as it was.

MR. GOODMAN: Can Mr. Doyle settle a judgment?

THE COURT: Do you have all you want on the record?

MR. GOODMAN: The only thing I wanted to add, your Honor, with respect to the damage issue, is that it was fully briefed in the trial briefs of both parties. It is a legal issue. I think you're entirely proper in doing what you did.

THE COURT: I'm not sure you can't find another case or two to brief in the Court of Appeals. But I think it's a question of law and I correctly

ruled on it. I intend to adhere on it.

MR. GOODMAN: I put forward Chemical's position that there has been no breach of this refinancing agreement. For the purpose of discussion, there are numerous instances in the law where there is a breach without damage, injury without damage and I think your Honor was entirely correct which is why I am consenting to Mr. Doyle's suggestion and asking that he settle a judgment on three days notice and we'll get cracking.

MR. DOYLE: Your Honor, the other aspect --

THE COURT: I'm not sure we can't draft a judgment here among ourselves. Judgments in the federal court are very short.

MR. DOYLE: We can do a

judgment. I do want to put in offers of proof. In other words, unless your Honor is directing me not to and I don't think you are, your Honor, I do want to --

THE COURT: I'm not. I will say that in ruling I looked at your proffer in the proposed findings of fact and in your answers to interrogatories and those satisfied me the damage calculation and theory must be dismissed as a matter of law.

MR. GOODMAN: Your Honor, I think of no better offer of proof that the proposed findings with the evidence.

THE COURT: That's the purpose of the pretrial order.

MR. GOODMAN: Exactly. I would oppose any additional offers of proof, your Honor. I think they are entirely

unnecessary.

MR. DOYLE: In other words, I gather what Mr. Goodman is saying for purposes of appeal he will not seek to in any way, shape or form on appeal to suggest that we should have made offers of proof at this time. In other words, he's waived, in all forms, any argument to that effect.

MR. GOODMAN: I'm not saying that I'm waiving anything in all forms. What I am saying is very clear. I think that your offer of proof is your joint pretrial order. The judge has dealt with it.

THE COURT: I may say the ruling rested on what I considered the presentation that the plaintiff was obliged to make at this stage of the case with respect to its damage proof

and that was contained in its experts' affidavits, its answers to the defendants' interrogatories and those paragraphs of its joint pretrial order that dealt with its damages.

MR. DOYLE: It is isn't only damages I would want to make the offers of proof on. There are a whole of other series of findings of fact that were stricken.

MR. GOODMAN: There were expert affidavits submitted on both sides. I assume all of that is going to go up as well.

MR. DOYLE: If Mr. Goodman is saying on appeal he's not going to ever say or argue that we should have made offers of proof at this time, if he would say that here and now, we don't need to make an offer of proof.

THE COURT: It seems to me fair if you are going to say he should come up with something else, then he should have a chance.

MR. GOODMAN: I will rest on it.

MR. DOYLE: What do you mean by you rest on it, counsel?

MR. GOODMAN: Which is to say that you need not put in any additional offers or proof. I think that the joint pretrial order and under the judge's rules the proposed experts' affidavits and the references in the pretrial order to the evidence to be adduced under it, which we all know about, is an abundant record for the Court of Appeals to determine the issues.

MR. DOYLE: I gather what Mr. Goodman is saying he's never going to make an argument that we needed offers

of proof and that's my understanding on the record and on that basis I think we can go forward without an offer of proof.

THE COURT: That's my understanding also.

MR. DOYLE: Did you hear that?

MR. GOODMAN: I'm sorry.

MR. DOYLE: Maybe the reporter should read it back.

(Record read)

MR. GOODMAN: My colleague, Mr. Zelmanovitz, reminds me to the extent that he's had the opportunity in the joint pretrial order, your Honor, in the expert affidavits -- I don't want Mr. Doyle to come in and say that he had additional proof that was not contained in the joint pretrial order and in any evidentiary submissions made to date. This is a little tricky, your Honor, and

I want to be perfectly clear and candid. We regard your rules as requiring the parties to submit the joint pretrial order and the evidentiary material in support of it as being the complete record of what was to be tried.

THE COURT: I think my rules require that the findings of fact be stated in sufficient detail to support a judgment.

MR. GOODMAN: Right.

THE COURT: I believe that these findings and the theory which they tender could not in law support a judgment. The basis of the ruling is not that some detail of evidence has not been stated. The basis of the ruling is that the theory upon which the calculation of damages goes forward is inadmissible in a case of this nature.

MR. DOYLE: Could I just respond? This is apparently getting quite complicated.

Two weeks ago I noted that Mr. Crean, who was one of the witnesses who has been noticed in their pretiral order as a possible witness on a point -- I said we needed to take his deposition, and I said in your presence, your Honor, tell me what he's going to testify to. Your Honor ruled that Mr. Goodman did not have to tell me what he was going to testify to.

Now, having said that, okay, I don't think it's open to Mr. Zelmanovitz or Mr. Goodman to say that now we're bound by everything we said. In other words, obviously, you put your findings of fact in the pretrial order. You don't put everything a witness is going

to say which is what you could potentially do in an offer of proof. I would like to avoid an offer of proof obviously, your Honor. I think Mr. Goodman is leaning in that direction but I don't want any kickers here. That's my problem. I see sort of something coming that you are bound by what you put in the pretrial order.

MR. GOODMAN: I think you are bound by what you put in the pretrial order.

MR. DOYLE: Witnesses are quite different than an offer of proof.

MR. GOODMAN: Secondly, you raised the issue of Mr. Crean. What I said is you'll see it in the pretrial order. He's listed in the pretrial order and if my memory serves me correctly Mr. Crean's testimony dealt

solely with the counterclaim. If you've reviewed the pretrial order you would have seen that.

MR. DOYLE: I don't think you understand my point, Henry. Your Honor, my point is that I don't think your pretrial rules require us to say every word or every sentence that a witness is going to testify to and ruling that Mr. Goodman did not even have to tell me what Mr. Crean was going to testify to. I think that's implicit in the ruling of the court for Mr. Goodman to turn around and say somehow the pretrial order has all of the same sort of requirements as a offer of proof -- I mean, Henry, can't we just get over this without sort of any qualifications that you are not going to rely on any lack of offers of proof?

MR. GOODMAN: Can I have a word?

MR. DOYLE: Sure.

MR. GOODMAN: Thank you.

I wanted to respond specifically to the Crean issue and to what District Judge Stanton said. We told you that Crean would be identified in the joint pretrial order. He was. He is a witness solely with respect to the counterclaim. He is the controller of the Skaarup organization. He has nothing to do with the plaintiffs' complaint.

MR. DOYLE: Can we get off the record for a second?

THE COURT: Sure.

(Discussion off the record)

MR. DOYLE: While we were off the record Mr. Goodman raised or expressed a concern that we had put in a supplement

to our pretrial order and they had not yet had the opportunity to make objections to it and I said and I will say on the record as far as I'm concerned they will be deemed to have made any and all objections to the evidence set forth in that supplement permissible under the federal rules of evidence and that they can raise such objections in the Court of Appeals.

MR. GOODMAN: And we will have objections to that and they will be part of the record.

MR. DOYLE: If you're going to make specific objections then and they are going to be part of the record, put them in.

MR. GOODMAN: Fine.

MR. DOYLE: Then we don't need to agree that you can make any at all.

Let's go off the record again.

(Discussion off the record)

MR. GOODMAN: If your Honor would care to repeat your statement on 103(2) on how you would approach this.

THE COURT: Sure. The question has arisen whether it is necessary for the plaintiff to make a further offer of proof, that is, of course, primarily a decision within the domain of the plaintiff.

The rule of evidence 103 states that, "Error may not be predicated upon a ruling which admits or excludes evidence unless a substantial right of the party is affected and, subdivision 2, in case the ruling is one excluding evidence, the substance of the evidence was made known to the court by offer or was apparent from the context within

which questions were asked."

In ruling in limine as I did there was no doubt in my mind that the substance of the evidence to be offered was sufficiently clear from the answers to interrogatories, the experts' affidavits and the plaintiffs' proposed findings of fact to support and justify and, indeed, to require the rulings which were made.

MR. DOYLE: It's my understanding that the judgment that's to be entered in effect is a final judgment and would bring up all interlocutory orders. That's my understanding. Is that your understanding, Mr. Goodman also?

MR. GOODMAN: It brings it up except in the case of reargument there was the additional ground in the court's opinion that you were too late.

MR. DOYLE: Yes.

MR. GOODMAN: And that of course I will argue as well on appeal.

MR. DOYLE: You can argue that. In effect, what we're saying it's a final judgment for all purposes.

MR. GOODMAN: Yes, a final judgment for all purposes.

ooOoo

Appendix E

ENTERED ON
NOVEMBER 30, 1990

At a stated term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse, in the City of New York, on the 30th day of November, one thousand nine hundred and ninety.

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BIRENDRA MOHAN SHARMA, ASTRAL HOLDING CORPORATION, FREESIA SHIPPING CORPORATION, SUN LILY MARITIME INC., DOMAN TANKERS INC., and ZODIAC FINANCE CORPORATION,

Plaintiff-Appellants,

-v-

SKAARUP SHIP MANAGEMENT CORPORATION, OLE SKAARUP, BENT LARSON and CHEMICAL BANK,

Defendants-Appellees.

DOCKET NUMBERS 89-9191, 90-7015

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A petition for rehearing containing a suggestion that the action

be reheard in banc having been filed herein by Appellants BIRENDRA MOHAN SHARMA, et al.,

Upon consideration by the panel that heard the appeal, it is

Ordered that said petition for rehearing is DENIED.

It is further noted that the suggestion for rehearing in banc has been transmitted to the judges of the court in regular active service and to any other judge that heard the appeal and that no such judge has requested that a vote be taken thereon.

ELAINE B. GOLDSMITH
Clerk